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No. 03-279

IN THE

Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, *et al.*,
Petitioners,

v.

BILLY RAY PHIFFER, an individual,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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I. Unlike *Tennessee v. Lane* (02-1667), this case does not involve alleged due process violations; granting certiorari in this case, thus, may complement the grant in the Tennessee case.

In their petition seeking the issuance of a writ of certiorari, the state petitioners noted that, although this Court has granted the State's petition in *Tennessee v. Lane,* on a question essentially identical to the first question posed in the State's petition here, a grant of certiorari in this case nonetheless may complement the Tennessee case: (1) because, despite having granted certiorari three times to resolve that question, the opportunity for this Court to address the question has thus far proved elusive, and (2) because the claims at issue in the Tennessee case are based on alleged due process violations. In contrast, the claims at issue here are based solely on supposed equal protection violations.

In response, respondent Phiffer completely misses the State's point. He appears to believe that the State is asserting that due process claims are at issue here, and he thus observes, accurately but inappositely, that due process issues have "never been raised by the Petitioners herein, nor ha[ve] [they] ever been litigated in this case." (Response 4). As a procedural matter, he is correct, but that indeed is the State's point. Because this case does not involve alleged due process violations and was not decided below based on any supposed contrast between the analysis that applies to due process, as compared to equal protection, violations, it provides a potential contrast and complement to the Tennessee case. Given that this Court three times has granted certiorari to resolve the important issue of whether Congress validly abrogated the States' sovereign immunity with respect to claims brought under Title II of the Americans with Disabilities Act, and yet has had cases disappear and the opportunity to resolve the issue disappear along with them, it may well be prudent to grant certiorari in this case as well as in the Tennessee one.

II. Although the Ninth Circuit has sometimes parroted portions of this Court's Eleventh Amendment jurisprudence, it has not faithfully applied that case law, as respondent Phiffer contends it has.

Respondent Phiffer contends that, in this case, "[t]he Ninth Circuit Court of Appeals followed the line of cases decided by this Court in interpreting whether the Eleventh Amendment was a bar to the Respondent's claim under Title II of the ADA, the application of which is uniform, general and clearly established." (Response 4-5). If it were all so easy, "uniform, general and clearly established," of course, it would be difficult to understand why the circuit courts of appeal are deeply divided, and split four ways, on this issue, why this Court has granted certiorari three times to resolve it, and why, as Tennessee noted in its petition in *Lane,* the "Ninth Circuit stands in complete opposition to the other circuits," being the only one post-*Garrett* to have "specifically declined to reexamine Title II under the analysis required by this Court in *Garrett*[.]" (*Tennessee*, Pet. for Cert. 13). *See Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

In urging this Court not to grant certiorari in this case, respondent mischaracterizes petitioners' argument. According to respondent, "[p]etitioners erroneously argue that the examination of Title I of the ADA by this Court in *Garrett* predetermines and controls the conclusions of an examination of Title II of the ADA." (Response 8; footnote omitted). However, that is not now, and never has been, petitioners' argument. Instead, petitioners have argued consistently, not that the outcome in *Garrett* controls, but that the Ninth Circuit steadfastly has refused to apply the analytical method prescribed in that decision, as well as in other decisions from this Court.

In their appellants' brief filed with the Ninth Circuit Court of Appeals, for example, petitioners noted that court's post-*Garrett* decision in *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167

(9th Cir. 2002), *reh'g en banc denied* 294 F.3d 1166, *cert. dismissed* ___ U.S. ___, 2003 WL 1792116 (2003), was distinguishable because it merely rejected the state's argument that "*Garrett* overrule[d] both *Clark* [*v. State of California,* 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998)] and *Dare* [*v. California,* 191 F.3d 1167 (9th Cir. 1999), *cert. denied* 531 U.S. 1190 (2001)]." 279 F.3d at 1171. In this case, however, petitioners do not argue simply that *Garrett* "overrules" *Clark* and *Dare*. "Instead, [the state] defendants contend that both the result reached and the analytical method employed in *Garrett* requires a reexamination of the Eleventh Amendment issues considered in those cases, and that such a reexamination necessarily must lead to a different result."
(App. Br. 10-11; footnote omitted).

Although respondent insists that the Ninth Circuit has "faithfully applied" this Court's Eleventh Amendment jurisprudence (Response 10, 11), an examination of that court's decisions with respect to both Title II of the ADA and Section 504 of the Rehabilitation Act hardly supports that endorsement. Before *Garrett,* the court gave great deference to Congress's judgment when purporting to abrogate State sovereign immunity, asserting that "Congress's power to pass legislation under the Fourteenth Amendment is very broad," and that "Congress acts within its authority under the Fourteenth Amendment if the court can perceive a basis upon which Congress might predicate a judgment that the state action constituted an invidious discrimination in violation of the Equal Protection Clause." *Clark*, 123 F.3d at 1270 (internal quotation marks and citation omitted). In contrast to that highly deferential approach, in *Garrett* this Court emphasized that, if Congress is to validly abrogate the States' sovereign immunity when acting under its Fourteenth Amendment, section 5 authority, Congress must identify a pattern of unconstitutional discrimination on the part of the States. *Garrett*, 531 U.S. at 369-74.

Post-*Garrett*, the Ninth Circuit was no more thoughtful in applying or true to this Court's analytical method than it had been before. In *Hason*, the court merely observed that, before *Garrett*, it had "held that in enacting Title II of the ADA Congress validly abrogated state sovereign immunity," and then the court summarily swept aside the state's argument that "*Garrett* overule[d] both *Clark* and *Dare*." 279 F.3d at 1170, 1171. The court's analysis consists of two sentences, one observing that, in *Garrett*, this Court "expressly declined to decide whether Congress validly abrogated State sovereign immunity in enacting *Title II* of the ADA," and the other "therefore conclud[ing] that [because] *Garrett* does not overrule either *Clark* or *Dare*," the plaintiff's Title II claims were not barred by the Eleventh Amendment. 279 F.3d at 1171 (emphasis in original).

The Ninth Circuit's subsequent treatment of the issue is no more probing than it was in *Hason*. In *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002), the court simply observed that *Garrett* had not decided the Title II issue, that the court "recently held in *Hason* * * *, that *Clark* and *Dare* are still good law as to Title *II* of the ADA, and that the Eleventh Amendment does not bar claims against the State brought under Title *II* of the ADA." (Emphasis in original). "Thus," the court summarily concluded, "we reject the State's argument as to Title II of the ADA." (Footnote omitted). *See also Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003) (adhering to *Clark* and *Dare* because *Garrett* did not overrule them, and concluding that court is "bound by [its] holding in *Hason*").

Clinging steadfastly, and uncritically, to the Ninth Circuit's pre-*Garrett* case law regarding Title II hardly amounts to "faithfully appl[ying]" this Court's analytical methodology. Nor does Ninth Circuit precedent regarding Section 504 of the Rehabilitation Act fare any better when it is examined in light of the methodology outlined by this Court in *Garrett* and in other decisions.

In *Clark*, the court reasoned that, because Section 504 was enacted pursuant to section 5 of the Fourteenth Amendment, it therefore validly abrogated the States' sovereign immunity. The court observed: that this Court's "opinions have consistently considered section 504 to be enacted pursuant to the Fourteenth Amendment;" that, in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244 n. 4, this Court "assumed without deciding that the Rehabilitation Act was enacted under the Fourteenth Amendment;" and that later, in dicta, this Court "expressly noted that '[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment." 123 F.3d at 1271, citing *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 n. 2 (1987). Finally, the court cited its own decision "expressly [holding] that the Rehabilitation Act was enacted under the Fourteenth Amendment." *Id.*, citing *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, 361 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 234 (1985).[1].

Of course, the fact that the Rehabilitation Act was enacted pursuant to section 5 of the Fourteenth Amendment does not answer the question of whether Congress validly abrogated the States' sovereign immunity in the Act. Nowhere in *Clark* is there any discussion of the legislative history underlying Section 504 or of whether the Act's remedial scheme is congruent with and proportional to the targeted violation. *Garrett*, 531 U.S. at 374 ("remedy imposed by Congress must be congruent and proportional to the targeted violation"). Thus, *Clark* cannot be said even to make an attempt at applying the analytical methodology that this Court has held should apply when judging the validity of an act of Congress purportedly abrogating State sovereign immunity.

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[1] The court's decision in *Clark* with respect to Section 504 was also based on a waiver analysis—a subject discussed in the next section of this reply brief. Subsequently, the court has skirted the Eleventh Amendment issue in cases involving Section 504 claims by relying on a waiver analysis. *See. e.g., Miranda B.*, 328 F.3d at 1186; *Lovell*, 303 F.3d at 1051.

The Ninth Circuit's refusal to examine critically or in any detail the legislative history underlying Title II of the ADA and Section 504 is echoed in respondent's brief. Although respondent insists that "[u]nlike the record of discrimination in State employment discussed in *Garrett*, there exists an extensive record of unconstitutional State conduct regarding people with disabilities covered by Title II," respondent provides no evidence to support that assertion. (Response 11). Instead, respondent relies on what he contends is "the extensive record and documented pattern of unconstitutional discrimination [cited] in *Dare* [.]" (Response 12).

In *Dare*, however, the court relied exclusively on the factual findings of discrimination that Congress made in the ADA itself. 191 F.3d at 1174-75 (citing 42 U.S.C. § 12101(a)). Respondent also relies on those findings. (Response 9-10). But, as this Court held in *Garrett*, such Congressional findings, without more, cannot provide the re-quired evidence of "a pattern of discrimination by the States which violates the Fourteenth Amendment [.]" 531 U.S. at 374. A bare finding that discrimination against the disabled exists in "public services," 42 U.S.C. § 12101(a)(3), provides little information, and it certainly does not establish that *the states* have engaged in *unconstitutional* discrimination in that regard.

In arguing that Title II is significantly different than Title I of the ADA, respondent also appears to rely simply on the size of the record Congress "amassed through the congressional hearings and individual State task force hearings[.]" (Response 10). The mass of the Congressional record cannot substitute for pertinent evidence of unconstitutional discrimination on the part of the states.

More extensive and thoughtful reviews of the congressional record underlying Title II (and the Rehabilitation Act) have found much the same dearth of evidence that this Court identified in *Garrett* with respect to Title I. *See Reichenbacker v. Foster*, 274 F.3d 974, 981-82 (5th Cir. 2001) (finding same flaws in congressional record regarding Title II that

the Court found in *Garrett* regarding Title I); *Thompson v. Colorado*, 278 F.3d 1020, 1033-34 (10th Cir. 2001) (en banc), *cert. denied* 535 US 1077 (2002) (summarizing congressional record regarding Title II and reaching same conclusion); *Panzardi-Santaigo v. University of Puerto Rico*, 200 F. Supp. 2d 1, 13 (D. Puerto Rico) (summarizing the results of the court's "thorough" review of the legislative history of the ADA and concluding that "[t]he legislative history of the statute, particularly as to Title II, suffers from the same deficiencies identified by the Court in *Kimel* [*v. Florida Bd. of Regents*, 528 U.S. 62 (2000),] and *Garrett*"). *See also* Roger C. Hartley, "Enforcing Federal Civil Rights Against Public Entities After *Garrett*," 28 J.C. & U.L. 41, 89 n. 272 (2001). ("There is no reason to believe that the Rehabilitation Act's legislative history better supports a pattern of state employment discrimination than does that of the ADA Title I.").

Finally, respondent criticizes petitioners for "fail[ing] to address * * * the fact that Title II of the ADA differs dramatically from Title I." (Response 9). Respondent notes that, in *Garrett*, "this Court specifically refrained from passing judgment on Title II as that title 'has somewhat differing remedial provisions from Title I.'" (Response 9, quoting *Garrett*, 531 U.S. at 360 n. 1). The remedial provisions of Title II have essentially the same flaws as those of Title I, however. Title II requires that a state make "reasonable modifications" in its programs, services, and activities, 42 U.S.C. § 12134, 28 C.F.R. §§ 35.130(b)(3)-(8), for "quailfied individual[s] with a disability," *id.*, 42 U.S.C. § 12131(2), unless the state can establish that the modification would work a fundamental alteration in the nature of the program, service, or activity, 28 C.F.R. § 35.130(b)(7). As the Second Circuit observed in *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 109 (2nd Cir. 2001),

> [w]hile the absence of a reasonable accommodation would be permissible under the Fourteenth Amendment

> so long as there were *any* rational basis for the absence, this provision of Title II allows but a single basis for not providing the accommodation: a showing that a fundamental alteration in the nature of the program, service, or activity would occur.

(Emphasis in original). *See also Thompson*, 278 F.3d at 1031 (in contrast to the Equal Protection Clause, Title II requires public entities "to make favorable accommodations on" behalf of the disabled).

Thus, despite respondent's argument to the contrary, the "reasonable accommodation" requirement is neither congruent with nor proportional to the Fourteenth Amendment right. *See also Reichenbacker*, 274 F.3d at 983 ("Since the accommodation obligation imposed by Title II and § 504 of the Rehabilitation Act far exceeds that imposed by the Constitution, we cannot conclude that they are proportional and congruent to the legislative findings of unconstitutional discrimination against the disabled by the States") (footnote omitted). In addition, "whereas under the Fourteenth Amendment the absence of an accommodation would be presumptively permissible with the burden of challenging it squarely on the plaintiff, Title II shifts the burden of proof onto the state to defend the absence." *Garcia*, 280 F.3d at 109-10.

In sum, with respect to petitioners' arguments regarding Title II of the ADA and Section 504, respondent mischaracterizes or misunderstands petitioners' reliance on *Garrett*, which petitioners cite, not for its precise holding, but for its reasoning—reasoning that is incompatible with that repeatedly employed by the Ninth Circuit. Moreover, respondent relies on legislative history that is not meaningfully distinguishable from that found wanting in *Garrett* and on a remedial scheme that is marred by the same flaws identified by this Court in that case. The result in *Garrett* does not control the outcome here, but the Court's reasoning applies with equal force to Title II of the ADA and Section 504 of the Rehabilitation Act.

III. The State petitioners did not knowingly waive their immunity to claims brought under Section 504 of the Rehabilitation Act; respondent, like the federal courts of appeal on one side of this circuit split, appears to conflate Congress's intent with the State's.

In their petition, the state petitioners established that the circuits are split in their approach to the issue of whether a state or a state agency waives its sovereign immunity to claims brought under Section 504 when it accepts federal funds. No one disputes that the Rehabilitation Act "manifests [Congress's] clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." *Clark*, 123 F.3d at 1271. That intent is unambiguously expressed in 42 U.S.C. § 2000d-7(a) (Response 18 n. 7).

What appears to divide the circuits instead is whether they come at the issue of waiver from the Spending Clause or the Eleventh Amendment side of the issue. Circuits approaching the issue from a Spending Clause perspective emphasize the great leeway Congress has to place conditions on the funding it gives to the States. (*See* Pet. for Cert. 20-24, canvassing cases). In contrast, the Second and Fifth Circuits have addressed the issue by focusing on Eleventh Amendment jurisprudence and asking whether a state's waiver is a knowing and voluntary one. *Garcia*, 280 F.3d at 114-15; *Pace v. Bogalusa City School Board.*, 325 F.3d 609, 615-16, *reh'g en banc allowed*, 339 F.3d 348 (2003). That tension point between Spending Clause and Eleventh Amendment jurisprudence—a tension point that pulls courts in opposite directions, *see Douglas v. California Dept. of Youth Authority*, 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, J., dissenting)—appears to be the source of the circuit split that the State asks the Court to examine and resolve in this case.

Respondent seems to take the same view as those circuit courts of appeal that have viewed the issue from a Spending Clause perspective only. Indeed, respondent appears to go even further by suggesting that the issue of waiver is "purely

objective" and that whether a State in fact has made a knowing and voluntary waiver is irrelevant. (Response 21). For that rather extreme view, respondent relies on this Court's decisions in *Barnes v. Gorman*, 536 U.S. 181, 153 L. Ed. 2d 230 (2002), and *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 152 L. Ed. 2d 806 (2002). (Response 20-22). Respondent misreads those decisions, however. In *Barnes*, this Court invoked the analogy between Spending Clause legislation and a contract, but this Court also held that, "[j]ust as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power * * * rests on whether the [recipient] *voluntarily and knowingly accepts* the terms of the "contract." 153 L. Ed. 2d at 236-27, quoting *Pennhurst State and School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). Similarly, in *Lapides* this Court repeatedly emphasized that a State's waiver of sovereign immunity must be voluntary. 152 L. Ed. 2d at 812-13, 815. What *Lapides* made clear was that, if the waiver was knowing and voluntary, the State's "motive" was irrelevant. *Id.* at 814.

Thus, nothing in *Barnes* or in *Lapides* forecloses the issue that the State contends that this Court "left open in *College Savings Bank* [*v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)]," and that the State asks this Court to address here: "when Congress conditions the acceptance of federal funds on the State's waiver of sovereign immunity, is that action reviewed as a condition under Congress's spending power or as the waiver of a constitutional right which must be knowing, voluntary and unequivocal?" (Pet. Cert. 20). That important question, which has split the circuits, is directly before the Court in this case.

CONCLUSION

For the reasons discussed in the petition for a writ of certiorari, as well as those discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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